



Interagency Alternate Dispute Resolution Civil Enforcement and Regulatory Section Newsletter

Volume 1, Issue 2, February 2004

A MESSAGE FROM CERS

In response to our first Newsletter issued this past fall (Nov. 03, www.adr.gov), we received a large number of positive emails and requests to be added to our mailing list.

We would like to invite you to join your colleagues who meet monthly to further the appropriate use of ADR in federal enforcement and regulatory activities. Our recent meetings have focused on identifying steps that would advance this mission. For example, we are sponsoring a series of brown bags in partnership with private sector organizations in the year 2004. We will tell you more about them in this newsletter once the topics and dates are established. We hope you will be able to attend.

How are we doing? How can CERS better support your efforts? We would like to hear your thoughts on where our efforts should be directed.

If you are interested in learning more about CERS or want to attend one of our meetings, please contact Richard Miles, Federal Energy Regulatory Commission, 202 502-8702, richard.miles@ferc.gov or David Batson, Environmental Protection Agency, 202 564-5103, batson.david@epa.gov.

HOW FACILITATION FOSTERS PROGRESS

The Arizona Department of Transportation (ADOT), the Bureau of Land Management (BLM), and the Federal Highway Administration (FHWA) had the opportunity to work together. The long-term project involved ADOT building roads using Federal-Aid Highway Program funds on BLM managed land. To say the least, this type of large, complex project is fraught with many potential difficulties.

In order to improve the effectiveness of their efforts, the agencies tried using ADR. Since 2000, a facilitator has helped this interagency team improve communication, address common areas of concern, and streamline the environmental review and project development process. The result was a resounding success and sets a model for future multi-agency efforts.

Result: Working relationships improved, allowing the agencies to successfully reduce duplication of work, and

minimize project delays. In fact, the agencies anticipate that processing time will be cut by more than 60%.

Process: The facilitator met with the agencies separately and jointly to define the issues and needs. The facilitator organized interagency meetings, took notes and helped the team formalize an effective approach.

Outcomes: Due in large part to the effective working relationships and facilitative process established, the team accomplished many difficult tasks, including,

- signing a Memorandum of Understanding and Operating Agreement which outline how each agency will operate and work together in the future;
- agreeing on definitions of common terms that, in the past, were defined and used differently;
- establishing procedures that allow the agencies to better integrate their planning, environmental review, and documentation efforts; and
- developing an electronic distribution system providing decision makers with information needed to make timely decisions.

For more information on this initiative, visit the FHWA website at www.environment.fhwa.dot.gov/strmlng/newsletters/dec03nl.htm

TIPS FOR THE NEGOTIATOR IN AN ADR PROCESS

In civil enforcement and regulatory matters, negotiation is frequently over a “fixed pie” of settlement outcomes. When the law and regulations prescribe the types of allowable outcomes, we tend to rely on past settlements to determine an acceptable settlement result. In so doing, we often fail to recognize opportunities for creative problem solving that would lead to joint gain.

There are, however, many opportunities to explore and create settlement options that (1) meet the intent of the regulations and (2) will satisfy all parties to a negotiation. For example, options might involve a mitigation and/or restoration plan for a parcel of land. In the case of a loan foreclosure, an agency may work with the property owner to find alternatives to help them bring the loan to a current status.

Max H. Bazerman, in “The Mythical Fixed Pie”, identified five steps that increase the likelihood of finding increased value in a negotiation.

- **Sharing information** - builds trust and understanding, essential building blocks in a successful negotiation.
- **Asking questions and listening carefully** - establishes a better understanding of the other party’s needs and interests.
- **Giving away a bit more information** - turns interactions between antagonistic parties in a more positive direction, potentially inspiring the other party to return useful information of his/her own and help to generate more options.
- **Make multiple offers simultaneously** - gives you insight into what the other party values most. For example, if the other party rejects all the offers, but is especially negative about the first and second offer, you may have learned new information about what is important to them.
- **Search for post-settlement settlements** - if you have an ongoing relationship with the other party and the legal ability to revisit a settlement, you may build in a later meeting to evaluate and potentially improve the settlement for both parties.

The five strategies that Mr. Bazerman provides offer opportunities to reach mutually satisfactory outcomes whereas a “fixed pie” approach often offers limited results. Try these strategies in your next negotiation and see the difference!

Adapted from, “The Mythical Fixed Pie” by Max H. Bazerman, Negotiation, A Newsletter from Harvard Business School Publishing and the Program on Negotiation at Harvard Law School, Volume 1, Number 1, November 2003.

ADR SEMINAR

The U.S. Institute for Environmental Conflict Resolution (www.ecr.gov) and the Federal Bar Association (www.fedbar.org) are jointly sponsoring a one-day seminar, entitled “ADR in Environment, Natural Resources and Land Use Disputes,” to be held on Friday, February 27, 2004 in Washington, DC.

This all-day program will focus on the use of dispute resolution in environment, natural resources and public land use disputes in federal litigation. Leading dispute resolution practitioners from both the private and government sectors will share their perspectives on a range of topics in four panel discussions providing attendees with candid perspectives, useful resources, diagnostic case assessment

tools and a lively discussion relating to media issues. James Connaughton, Chairman of the White House Council for Environmental Quality, Executive Office of the President, will be the keynote luncheon speaker. Attorneys and non-attorneys alike are encouraged to attend.

ASK CERS AND ANSWERS

Dear CERS,

I am an experienced federal litigator. I have already met with opposing counsel and tried to settle my case, but I was not successful. My agency ADR coordinator is suggesting I try ADR, but I don’t see why bringing in a third party neutral at this point will lead to a different result. Isn’t it a waste of my time and the agency’s money?

Not Convinced

Dear Not Convinced,

As experienced negotiators, we often face difficulties and challenges in reaching settlements with opposing counsel and their clients. In many situations, we overcome those negotiation obstacles, but in others, despite our best efforts and skill, we cannot. There are many reasons for this outcome, most beyond our control or influence as advocate counsel.

In many of these situations, an experienced neutral can make a difference. S/he can have conversations with opposing counsel that successfully address barriers to settlement in a way that would not be welcome or credible coming from you as a government litigator. For example, a neutral is able to:

- Influence opposing counsel on the reality of past settlements and potential litigation outcomes;
- Bolster the credibility of your statements regarding your agency’s enforcement or regulatory practice and expectations;
- Help opposing counsel explain the value of your offer to his/her client;
- Transmit offers without the baggage and perceptions that frequently accompany an offer from a government litigator; and
- Identify and suggest creative offers that have minimal impact on the government, but are meaningful to opposing counsel’s client.

In short, a neutral can open doors for you as an advocate and provide you the opportunity to successfully complete your negotiation, even after direct negotiations have failed.

CERS

If you have any comments about this newsletter, would like to submit an article, or have any questions for “ASK CERS AND ANSWERS”, please email Leah Meltzer at meltzerd@sec.gov or Elly Cleaver at elly.cleaver@usda.gov. The editors would like to thank the following people for their contribution to this issue: David Batson, Kirk Emerson, Judy Kaleta, Tamara McCrae, and Rick Miles